No. 18-483

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL.,

Petitioners

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE PROLIFE CENTER AT THE UNIVERSITY OF ST. THOMAS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The Prolife Center at the University of St. Thomas seeks to promote effective legal protection for human life from the moment of fertilization to natural death through scholarly research, curriculum development, and legal initiatives. Faculty associated with the Center have provided significant *pro bono* representation to government officials, organizations and individuals supporting regulation and the eventual elimination of the practice of induced abortion.

As an academic center located in Minnesota, the Prolife Center has studied incidents resulting in passage of fetal disposition statutes similar to those at issue in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health* ("*PPINK*"), 888 F.3d 300 (7th Cir. 2018), as well as the state interests advanced by such statutes. The Prolife Center submits this brief

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[1] As required by Rule 37.2(a), counsel of record for each party counsel of record for each party received notice of the intent to file this amicus brief on November 9 and has consented to the filing of this amicus brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

to provide this Court with greater insight into how fetal disposition laws advance the right of States to recognize and promote the dignity of fetal human life, and promote public health and safety.

SUMMARY OF THE ARGUMENT

Review is warranted in this case for at least two reasons. First, the Seventh Circuit's decision in *PPINK* creates a circuit conflict with the Eighth Circuit on an issue of whether statutes directing abortion clinics and medical facilities to dispose of human fetal remains by cremation or internment should be interpreted to attribute constitutional personhood, rendering all such statutes unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973). Second, the Seventh Circuit's decision creates a circuit conflict with the Eighth Circuit by requiring fetal disposition laws to override state laws recognizing a woman's right to sepulcher, the right to possess or control the disposition of fetal remains, in order to respond to a persistent problem of improper disposition of fetal remains by abortion clinics and others.

ARGUMENT

I. The Court Should Grant Certiorari Because the Circuits Are in Conflict over Whether Laws Directing the Disposition of Fetal Remains Impermissibly Attribute Constitutional Personhood to Human Fetuses.

A majority of the court below ruled that Indiana's fetal disposition law, Ind. Code §16-34-3-4, is unconstitutional under this Court's abortion jurisprudence because the state's interest undergirding the statute, "the humane and dignified disposal of human remains", creates an irrebutable presumption that aborted fetuses enjoy constitutional personhood. *PPINK*, 888 F.3d at 308.

> Such a position inherently requires a recognition that aborted fetuses are human beings, distinct from other surgical byproducts, such as tissue or organs. Indeed, in its brief, Indiana maintained that it "validly exercised its police power by making a moral and scientific judgment *that a fetus is a human being* who should be given a dignified and respectful burial and cremation." (Emphasis added).
>
> . . .

> Simply put, the law does not recognize that an aborted fetus is a person. . . . As such, the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate.

Id.

The reasoning of the majority is undercut both by its substitution of "person" for the state's use of the "human being" in its defense of the statute, and more importantly by the actual language of the Indiana statute.

Ind. Code §16-34-3-4(a) provides "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus." The phrase "aborted fetus" is consistently used to identify the dead biological entity that is the subject of the law.

The phrase "human being" is entirely absent from the statue, while the word "human" appears only as an adjective modifying the word "remains" in subsection (c). "IC 23-14-31-26, IC 23-14-55-2, IC 25-15-9-18, and IC 29-2-19-17 concerning the authorization of disposition of human remains apply to this section." Ind. Code §16-34-3-4(c).

While it is true the word "person" appears in the statute twice, it is used only to designate the individual arranging for the disposition of the "aborted fetus." Ind. Code §16-34-3-4(a)(1) provides "a *person* is not required to designate a name for the *aborted fetus* on the burial transit permit and the space for a name may remain blank", and Ind. Code §16-34-3-4(b) states "[t]he local health officer shall issue a permit for the disposition of the *aborted fetus* to the *person* in charge of interment for the interment of the aborted fetus."

This analysis of the statutory language reveals the linguistic leaps required to render the lower court's ruling of unconstitutionality. That the ruling is a result in search of a rationale becomes even more apparent when compared with the language of the Minnesota statute upheld in *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479 (8th Cir. 1990).

In that case, Planned Parenthood of Minnesota sought to enjoin the enforcement of a fetal disposition law on the bases that the statute was vague and violated the substantive due process rights of women seeking abortions.

Unlike the Indiana statute at issue in this case, which does not use the phrase "human being," the Minnesota statute forthrightly declares that fetal

remains are "the remains of the *dead offspring of a human being . . .*" 910 F.2d at 481 (providing text of Minn. Stat. § 145.1621 (1988) (emphasis added).[2]

Planned Parenthood of Minnesota, as part of its substantive due process claim, argued that the statute implicitly equated abortion with murder, thereby creating a psychological burden for women obtaining abortions. The appellate court summarily dismissed this claim and ultimately upheld the constitutionality of the statute. 910 F.2d at 487-88.

The Seventh Circuit opinion below distinguishes the Minnesota case as vindicating only those fetal disposition laws that are passed for the protection of public sensibilities, while the court characterizes the Indiana statute as focusing on the fetus. 888 F.3d at 309. Unlike the Minnesota statute, the Indiana statute has no purpose provision so it is difficult to determine the basis of the lower court's conclusion that the Indiana statute is unconcerned with protection of public sensibilities.

It is equally difficult to discern why the Seventh Circuit majority characterizes the Minnesota statute as exclusively supported by the state's

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[2] Like the Indiana statute, the word "person" appears in the Minnesota statute but only in a context that logically precludes the word including the aborted fetus. 910 F.2d at 481 (quoting Minn. Stat. § 145.1621(subd. 5) (1988).

interest in public sensibilities. While protection of public sensibilities was one of the state's interests identified in the statute, other interests are identified as well. The stated object of the statute was to require "the dignified and sanitary disposition of the remains of aborted or miscarried human fetuses . . ." 910 F.2d at 481 (quoting Minn. Stat. § 145.1621(subd. 1). By requiring the disposition be dignified, the Minnesota law appears to be focusing on the fetus, as much as the public. Black's Law Dictionary defines dignity as "[t]he quality, state, or condition of being noble; the quality, state, or condition of being dignified." *Dignity, Black's Law Dictionary* (10th ed. 2014).

Applying the Seventh Circuit's linguistic analysis to the Minnesota statute, the opinion would read something like this:

> The statute identifies remains of a human fetus as the "remains of the dead offspring of a human beings", distinct from other surgical byproducts, such as tissue or organs. Indeed, in the stated purpose of the statute, Minnesota requires that aborted human fetuses be provided dignified disposition. Doing so imputes worth to the human fetus. Yet under Supreme Court jurisprudence the law does not recognize that an aborted fetus is a person. . . . As

> such, the State's interest in requiring abortion providers to dispose of the remains aborted fetuses in the same manner as the remains of human persons is not legitimate.

Such a ruling would ignore this Court's repeated recognition of a state's right to "use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

Assuming the Seventh Circuit had utilized an updated version of the constitutional analysis employed by the Eighth Circuit, the result would be that of Judge Manion's dissenting opinion below. "Like the Eighth Circuit, I would conclude that Indiana's fetal remains provision is rationally related to the State's interest in protecting public sensibilities. I would add that Indiana has a significant interest in recognizing the dignity and humanity of the unborn child." 888 F.3d at 320.

It is simply impossible to reconcile the rulings of the Seventh and Eighth Circuits based on the language of the statutes and derive a coherent constitutional rule by which to assess fetal disposition laws. Legislators and other public officials need this Court's guidance on the proper legal standard governing fetal disposition laws to

ensure their performance is within their constitutional mandates.

II. Public Officials Need Guidance on Whether Accommodation of the Ancient Common Law Right of Sepulcher Renders a Fetal Disposition Law Unconstitutional.

The Seventh Circuit opinion imposes a substantial, if not insurmountable, barrier to regulating abortion clinics' or health care facilities' disposition of fetal remains, while continuing to respect a woman's right of sepulcher as it exists in many states. The right of sepulcher is a family member's right to "immediate possession of a decedent's body for preservation and burial." 25A C.J.S. Dead Bodies § 13. Indiana law has recognized such a right for 150 years. *Hamilton v. City of New Albany*, 30 Ind. 482 (1868). This right has also been recognized by federal courts.

Just fourteen years ago, this Court noted in a unanimous opinion, "[t]he well-established cultural tradition of acknowledging a family's control over the body and the deceased's death images has long been recognized at common law." *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 158 (2004). This right has such deep historical roots and is of such import that the Ninth Circuit has

characterized a parent's right to choose how to dispose of a child's body as an aspect of substantive due process. *Marsh v. Cty of San Diego*, 680 F 3d 1148, 1154 (9th Cir. 2012).

The opinion below evidences no consideration of this right, instead characterizing the state statute giving a woman "the right to determine the final disposition of the aborted fetus," Ind. Code § 16-34-3-2(a), as a constitutional flaw in Indiana's dispositional provisions. If allowed to stand, the decision requires state legislators to elect between respect for the rights of the family or regulation responding to a persistent problem of improper, if not indecent, disposition of fetal remains by abortion clinics and others.

The persistence of this problem is evidenced by repeated news reports of gruesome discoveries. *E.g.* B.D. Colen, *Hospital Got Cash for Fetuses*, Wash. Post, Feb. 29, 1976, at 25; *500 Fetuses Found by Storage Company in Repossessed Crate*, N.Y. Times, Feb. 8, 1982, at A14; *173 Fetuses Found in Field Doctor Owned*, Wash. Post, Apr. 16, 1992, at A16; *Fetus Parts Found in Abortion Clinic Trash*, N.Y. Times, July 18, 1993, at A30; *Fetuses Found in Calif. Field*, Wash. Post, Mar. 16, 1997, at A13; David Rohde, *A Store Owner Pleads Guilty to Transporting Fetuses Illegally*, N.Y. Times, Mar. 27, 1998, at B8. Joy Blackburn, *Report Finds Luis Hospital's*

Mistakes Range from the Potentially Deadly to Bureaucratic, V.I. Daily News (Sept. 22, 2014),https://advance.lexis.com/api/permalink/4a1d2884-1091-49a5-ab16-28162a897e1b/?context=1000516; Tony Cook, *Company Fined for Accepting Fetal Tissue*, Indianapolis Star, Feb. 17, 2016, at A12; and Donna Halvorsen, *Appeals Court Upholds State Law Requiring 'Dignified' Fetus Burial*, Star Trib., Aug. 3, 1990, at 1A.

Perhaps the most notorious case involving bizarre and gruesome disposition of fetal remains is the case of Philadelphia abortionist, Kermit Gosnell. "The remains of aborted fetuses were stored in water jugs, pet food containers and a freezer at a West Philadelphia abortion clinic, the city's chief medical examiner testified in the murder trial of the doctor who ran the facility." Sarah Hoye, *Medical examiner had to thaw fetal remains in Philly abortion doctor case*, CNN, Apr. 16, 2013, https://www.cnn.com/2013/04/16/us/pennsylvania-abortion-doctor/index.html.

Statutes like those of Indiana and Minnesota are rational attempts to address such abuses, yet lower courts have failed to adopt a consistent method of evaluating fetal disposition laws. For this reason, it is vital that this Court accept certiorari in this case and provide guidance to legislators on the question of whether the constitution requires laws regulating

the conduct of abortion clinics and medical facilities require denial of the common law right of sepulcher.

CONCLUSION

For the reasons set forth above, this Court should grant Indiana's petition for a writ of certiorari.

Respectfully submitted,

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